Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07328/2018

THE IMMIGRATION ACTS

Heard at UT (IAC) Hearing in Field House	**Decision & Reasons Promulgated**
On 28 February 2019	**On 15 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

MOSES [A]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Karim, Counsel instructed by A Vincent Solicitors
For the Respondent: Ms Pal, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on 13 April 1974. He has two children who were born on 26 April 2004 and 24 May 2005. Both children are citizens of Nigeria who have lived in the UK for more than seven years.

2. In June 2016, the appellant, who has been in the UK since March 2006, applied for indefinite leave to remain on the basis of ten years' continuous lawful residence. On 7 March 2018 the application was refused under paragraphs 276D and 322(5) of the Immigration Rules on the basis that the appellant had given incorrect information about his income on a previous application. The respondent also refused the application on the basis that removing him from the UK would not be contrary to Article 8 ECHR.

Decision of the First-tier Tribunal

3. The appellant appealed to the First-tier Tribunal where his appeal was heard by Judge Aujla. In a decision promulgated on 8 November 2018 the judge dismissed the appeal. The judge found that the appellant had intentionally understated his income in order to reduce his tax liability and on that basis concluded that it was reasonable to refuse his application under paragraph 322(5).

4. The judge also considered the appellant's relationship with his two children and concluded that he did not have a genuine and subsisting parental relationship with them for the purposes of article 8 ECHR. At paragraph 30 he stated:

> "30. The Appellant stated that he had two children. They were living with their mother who was his wife and from whom he was separated since 2015. He stated that the children's mother had status in the United Kingdom but he was not able to give further details about her status. He saw the children once a week. He also saw them in holiday time as well. He played an active role in their upbringing. He went to see the teachers at school. He saw the children on Sundays. He paid for their travel when he saw them. There was no cross-examination. In answer to a question from me, the Appellant stated that there was no witness statement from the children's mother about his role in the children's [sic] upbringing. She had equally not come to give evidence. "

5. At paragraphs 43 and 44 he stated:

> "43. I have considered the appellant's claim that he was in a genuine and subsisting relationship with his children. I have considered the letter from the school as well as the letter from the dentist. Those letters were written no doubt at the request of the appellant by those who did not scrutinise his credibility. Whilst I accept that he may well have attended dental appointments with his children and may even have attended a few school evenings, the remainder of this evidence is tainted by my serous concerns about his credibility. If the appellant was in a genuine and subsisting relationship with the children and that relationship was at risk if the appellant were removed, his wife would be aware of that and would be concerned if she was concerned about the welfare of the children. The evidence of the appellant's wife, who was the children's mother and primarily concerned with their

welfare as a mother, would be most important for me to consider especially as the children were living with her and not the appellant. There was no evidence from the children's mother.

44. I have considered the evidence presented to me. I find that whilst there were two letters showing that the appellant had contacted the children those letters did not without more demonstrate that he was in a genuine and subsisting relationship with the children. Parental relationship no doubt was something much more than attending a few parents' evenings at school since September 2016 or dental appointments with the children since 2013. There was no evidence of any financial support provided by the appellant to the children. There was no evidence of any set pattern of his contact with the children. Most important of all, there was no evidence from the children's mother about the level of involvement that he had in the children's upbringing. Having considered the evidence presented to me, I find that there was no genuine and subsisting parental relationship between the appellant and the children for the purposes of Article 8."

Grounds of Appeal and Submissions

6. There are seven grounds of appeal. The first five relate to the decision concerning paragraph 322(5) of the Immigration Rules. Permission to appeal in respect of these grounds was refused by Upper Tribunal Judge Jackson, who limited permission to appeal to grounds 6 and 7, which relate to whether the appellant has a genuine and subsisting relationship with his children.

7. Grounds 6 and 7, in summary, contend that the evidence before the First-tier Tribunal, properly understood, establishes that the appellant has a genuine and subsisting relationship with his children and that to draw the contrary conclusion is inconsistent with the evidence. In particular, the grounds argue that it was irrational for the judge to reject or attach little weight to the evidence from the children's school and dentist that the appellant attends appointments in relation to the children. The grounds also contend that the appellant's evidence that he provides financial support to the children was unchallenged and therefore it was an error for the judge to conclude that financial support was not provided.

8. In addition, the grounds argue that the judge's conclusions were contrary to the guidance in *SR (subsisting parental relationship – s.117B(6))* [2018] UKUT 334 (IAC) where a distinction is drawn between an active role in a child's upbringing for the purposes of E-LTRPT.2.4 and a genuine and subsisting parental relationship for the purposes of Section 117B(6) of the 2002 Act.

9. At the error of law hearing Mr Karim argued that I should consider the grounds of appeal in respect of which permission had been refused on the basis that Section 5 and the Overriding Objective in the Tribunal Procedure Rules permit me to do so. I refused, as I was not persuaded there was a good reason to depart from the grant of permission and Mr Karim was

unable to cite any authority where a Tribunal had taken such a course of action.

10. In his submissions, Mr Karim highlighted paragraph 30 of the decision where the judge summarised the appellant's account of his relationship with his children. The appellant was not cross-examined and Mr Karim argued that the implication of this was that evidence had been accepted by the respondent. He maintained that the appellant's evidence, as set out in paragraph 30 of the decision, was adequate to establish a genuine and subsisting parental relationship with his children.

11. Mr Karim also argued that the judge was wrong to say that the appellant did not financially support the children when it had been accepted by the respondent that he paid for some school items.

12. Mr Karim was also critical of the judge disregarding the letter from the school and dentist on the basis that the authors of the letters did not scrutinise the appellant's credibility. He argued that this was irrelevant as the letters pertained to facts regarding the extent of the appellant's contact with the children and it was irrelevant that the authors of the letters would not have considered the appellant's credibility.

13. Ms Pal submitted that although the appellant was not cross-examined the position of the respondent in the First-tier Tribunal (as set out in paragraph 32 of the decision) was that the evidence did not show that the appellant supported his children, or that he was in a genuine and subsisting relationship with them. She argued that the judge had clearly had regard to all material evidence, including in particular the letters from the school and dentist, and it was open to the judge to conclude that this evidence, combined with the appellant's own evidence, was not sufficient to establish that there was a genuine and subsisting parental relationship.

Analysis

14. Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") sets out requirements that, if met, mean that there will not be any public interest in a person's removal from the UK. One of the requirements is that the person must have a genuine and subsisting parental relationship with a qualifying child.

15. An appellant can have a genuine and subsisting parental relationship with his biological child even if he does not have an active role in the child's upbringing so long as there is some degree of ongoing direct parental care. In *SR (Subsisting Parental Relationship)* [2018] UKUT 334, the appellant was found to have a genuine and subsisting parental relationship with his child even though he had not been taking an active part in his upbringing and only saw the child for 3 hours every two weeks.

16. Reviewing the decision as a whole, I have reached the conclusion that the judge set the bar too high for the appellant to establish that his parental

relationship with his children is genuine and subsisting. The documentary evidence before the First-tier Tribunal showed that the appellant attends dental appointments and school evenings for his children and that he purchases some items for them. It is also apparent from the evidence that he spends time with the children (although the judge found that there was no evidence of a set pattern to the contact). The judge has failed to explain why this level of direct parental care - which appears to be greater than that provided by the appellant in *SR* - is insufficient to amount to a genuine and subsisting parental relationship as that term has been interpreted by the Upper Tribunal in *SR* as well as by the Court of Appeal (although in a different context) in *VC (Sri Lanka)* 2017 EWCA 1967. This is a material error of law.

17. I have decided to remit the appeal to the First-tier Tribunal to be determined afresh. My reason for so doing is that, if a judge were to find that the parental relationship is genuine and subsisting, he or she would then need to consider the best interests of the children as well as whether expecting them to leave the UK is reasonable under Section 117B(6) of the 2002 Act. Such an assessment is likely to require considerable fact finding. I therefore consider the First-tier Tribunal to be the appropriate forum for this decision to be remade.

Decision

18. The decision of the First-tier Tribunal contains a material error of law and is set aside.

19. The appeal is remitted to the First-tier Tribunal to be heard afresh before a different judge.

Signed

Deputy Upper Tribunal Judge Sheridan Dated: 14 March 2019